involve the elimination of national disparities, whether in the field of taxation or of commerce, affecting trade with non-member countries.

A scheme whereby a Community tariff quota, opened as part of the system of generalized tariff preferences, is apportioned into national shares does not in any way serve the aim of reducing such disparities but is, on the contrary, liable to lead to distortions and deflections of trade. Nevertheless, as the common commercial policy now stands, such a scheme may be compatible with Articles 9 and 113 of the Treaty provided that certain conditions are satisfied.

First, the apportionment into national shares must be justified by administrative, technical or economic constraints which preclude the administration of the quota on a Community basis. Secondly, the apportionment scheme must include machinery to ensure that, until the overall Community quota is exhausted, goods may be imported into a Member State which has exhausted its share without having to bear customs duties at the full rate or to be rerouted via another Member State whose share has not been exhausted. Lastly, the apportionment must not impair the free movement of goods once those goods have been put in free circulation in the territory of a Member State, and in every Member State all the traders concerned must have access to the share allocated to that State.

Since they fail to observe those principles, Regulations Nos 3924/86 and No 3925/86 must be annulled, although their effects are to be considered definitive.

REPORT FOR THE HEARING
delivered in Case 51/87 *

I — Summary of the facts

The Community generalized preferences scheme was set up for 10 years in 1971 and extended for a second 10-year period in 1981. Every year regulations are adopted on the implementation of that scheme. For 1987, three Council regulations were adopted on 16 December 1986 and published in Official Journal L 373 of 31 December 1986: Regulation (EEC) No 3924/86 of 16 December 1986 applying generalized tariff preferences for 1987 in respect of certain industrial products originating in developing countries (ibid., p. 1); Regulation (EEC) No 3925/86 of 16 December 1986 applying generalized tariff preferences for 1987 to textile products originating in developing countries (ibid., p. 68) and Regulation (EEC) No 3926/86 of 16 December 1986 applying generalized tariff preferences for 1987 in respect of certain agricultural products originating in developing countries (ibid., p. 126). The last-mentioned regulation is not at issue in these proceedings.

* Language of the Case: French.

The Community generalized preferences scheme essentially consists in suspension of the customs duties set out in the Common Customs Tariff and is granted on a unilateral basis without a requirement of reciprocity in order to facilitate the import of certain products originating in certain developing countries.

The suspension of those customs duties may be total or partial, either within a quota system with fixed limits or within a system of 'ceilings' which are administered more flexibly. For various products there are 'reference bases': when they have been reached, the Commission may reimpose customs duties, but only if economic difficulties exist within the Community. In general, the regulations make a distinction according to the degree of development and competitiveness of the beneficiary countries and according to the 'sensitivity' of the products involved.

Whereas the ceilings are administered on a Community basis by the Commission which, under the procedure provided for in the majority of cases, may reintroduce the levying of customs duties when the ceilings have been reached at Community level, tariff quotas are apportioned amongst the Member States according to fixed scales which are based on general economic criteria. The share of each Member State is based on external trade figures in the relevant sectors and, in the case of industrial products in general, on the gross national product and population (see Regulation No 3924/86).

For industrial products in general the initial shares only represent a first tranche which is 80% of the quota. The second tranche (20%) forms a reserve to cover the subsequent requirements of Member States which have exhausted their initial shares. If 90% or more of that initial share has been used up the Member State concerned immediately notifies the Commission thereof and draws a second share amounting to 10% of its initial share; further shares may subsequently be drawn on the basis of the same criteria until the reserve has been exhausted. The Member States are permitted to limit the exercise of their total obligation to draw on the reserve amount to at least 60% of their initial share. Member States must return to the reserve, not later than 1 October 1987, the unused portion of their initial share which on 15 September 1987 exceeds 15% of the initial amount.

It is only in the case of products from the chemical and petrochemical sectors that Regulation No 3924/86 does not provide for the allocation of the preferential amount amongst the Member States but instead provides for a system to be administered by the Commission allowing all importers equal access thereto.

By contrast, in its proposal for Regulation No 3294/86 (Official Journal C 289, 17.11.1986, p. 1) the Commission did not envisage any apportionment of quotas amongst the Member States. The administration of all Community quotas was to be entrusted to the Commission in collaboration with the Member States.

As regards textile products (see Regulation No 3925/86) there are only fixed shares without reserves. The Commission's proposal (Official Journal C 289, 17.11.1986, p. 54) envisaged a provision to promote better use of tariff quotas, which was not accepted by the Council. Under that proposal the Commission would have been able, within the limits of the quotas, to allocate to a Member State which had used

up its share portions of the shares of other Member States which had declared that they would not be able to use them up before 31 December 1987.

The two regulations which are the subject of the present action, in common with all the preceding annual regulations concerning the application of generalized tariff preferences to those same products, cite the EEC Treaty as the legal basis ('having regard to the Treaty establishing the European Economic Community') whilst the Commission proposed the addition of the words 'in particular Article 113 of the Treaty', as it has done every year from the outset (1971). That difference of opinion was at the centre of Case 45/86 (judgment of 26 March 1987 *Commission* v *Council* [1987] ECR 1493) in which the Court declared that the two contested regulations (applying generalized tariff preferences for 1986) were void and ruled that they fell within the common commercial policy and should therefore be based only on Article 113 of the Treaty.

II — Written procedure and conclusions of the parties

The Commission brought this action against the Council by an application lodged at the Court Registry on 18 February 1987. The *Commission* claims that the Court should:

(i) declare null and void Council Regulations (EEC) Nos 3924/86 and 3925/86 of 16 December 1986;

(ii) order the Council to pay the costs.

The *Council* contends that the Court should:

(i) dismiss the Commission's claims as unfounded;

(ii) order the Commission to pay the costs.

The written procedure followed its normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The parties were invited to reply in writing to certain questions which they did within the prescribed time-limits.

III — Submissions and arguments of the parties

1. *The legal basis*

In the first place the Commission bases its action on an alleged breach of essential procedural requirements and breach of the Treaty. By citing only 'the Treaty' as the legal basis, the contested regulations infringe the obligation to state reasons provided for in Article 190 of the Treaty and also Article 113 of the Treaty which is the only correct legal basis.

In view of the judgment in Case 45/86 (*supra*) the Council does not dispute that this submission is well founded and states that in future, when adopting regulations on the generalized preference scheme, it will act on the basis of Article 113 of the Treaty.

Having regard to that declaration by the Council and to the fact that the corresponding regulations for 1988 have been adopted on the basis of Article 113 of the Treaty alone, the Commission, at the hearing, withdrew its submission regarding legal basis.

2. *The content of the regulations*

The Commission bases its action on a breach of the Treaty, in particular Articles 9 and 113 of the Treaty, in so far as the regulations contain provisions which are incompatible with the principles of the Customs Union and in particular with the unity of the customs system *vis-à-vis* non-member countries.

(a) *Regulation No 3924/86*

Relying on the judgment of 13 December 1973 in Joined Cases 37 and 38/73 (*Diamantarbeiders* [1973] ECR 1609), the Commission points out that, as regards non-member countries, the Community constitutes a single entity, and that consequently a given imported product must be able to enter the Community under identical conditions wherever it happens to cross the customs frontier. Otherwise, trade might be deflected, the free movement of goods within the Community might be distorted, and the conditions of competition might be affected, all of which are incompatible with the principle of the Customs Union.

As regards the suspension of customs duties in the form of tariff quotas, the Commission infers from the abovementioned judgment that such a suspension must be applied in a uniform manner in each Member State until the quota has been totally exhausted.

The only sure way of observing the principles of the Treaty concerning tariff quotas is centralized administration of the quotas at Community level without apportionment into national shares, the system laid down for chemical and petrochemical products. That system ensures progressive and objective utilization of the quotas, which are channelled towards Member States in accordance with their needs, and therefore uniform import conditions throughout the Community.

Apportionment into national shares is permissible only if technical considerations do not allow Community administration of quotas. Progress in the field of telecommunications has removed conditions which would justify the system which the regulation lays down for products other than those in the chemical and petrochemical sectors.

The Commission maintains that the abovementioned factors suffice to make that system unacceptable but it further points out that, even if there were technical problems such as to preclude Community administration, apportionment of quotas into national shares could only be provisional and would have to depend on certain conditions which were not fulfilled in the present case.

The first of those conditions is set out in the judgment of 13 December 1983 in Case 218/82 (*Commission* v *Council* [1983] ECR 4063): once goods have been admitted into free circulation in one of the Member States they must be allowed to circulate freely throughout the Community.

The second condition, which is a corollary of the principle that the Community is a single customs entity, requires, first, that the quotas be apportioned exclusively on the basis of objective data concerning in particular trade patterns and their devel-

opment and, secondly, that there must be at Community level some means of correcting any errors in assessment or taking into account changes in the trade patterns.

In the present case the fixed scale of apportionment is unrelated to data concerning trade. Apart from the changes which had to be made at the times of the successive accessions, the percentages have remained practically unaltered since the coming into force of the generalized preference scheme in 1971. The criteria which have been applied since that year (external trade, gross national product and population) were reasonable at that time given the lack of specific statistics on the trade patterns of the products in question in previous years, but today they prevent the necessary adjustments being made to the shares.

As regards the indispensable corrective, it exists in the form of the reserve of 20% of each quota and represents an embryonic form of Community administration. However, the possibility which the Member States have of limiting the exercise of their total obligation to draw on the reserve amount to at least 60% of their initial share does not satisfy the essential minimum requirements for the apportionment of the quotas into national shares to be considered, on a transitional basis, to be compatible with Community law.

Such a situation has several negative consequences. It often happens that certain customs duties may be levied in full in one part of the Community on a particular product when the national share of the Community quota has been exhausted whereas those duties are not being levied on the same product which is being imported at the same time into another Member State. Similarly, because of the criteria applied, a share may be allocated to a Member State in which a particular product is, for commercial reasons, not imported at all, thereby causing underutilization of the quota. There are even quotas which are not used at all and in general the trend is falling. The reserve is too limited to attenuate those consequences. It is true that an importer into one Member State which has used up its share may have access to the share of another Member State. However, that possibility is often merely theoretical because of the considerable costs, the well-established commercial channels and the fact that contracts are concluded several months in advance.

The system provided for in the contested regulation is also incompatible with the principles of Article 113 of the Treaty since that instrument of Community commercial policy is being administered according to criteria which are to a certain extent not harmonized and reflect purely national interests of the Member States (see judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* [1976] ECR 1921).

The Council takes the view that it is compatible with the EEC Treaty, in particular with Articles 9 and 113, to divide the quotas into national shares as provided for by the regulation in question.

It is clear from the Court's case-law that two conditions must be observed for such a system to be permissible (see the judgment in Case 218/82, *supra*; judgment of 12 December 1973 in Case 131/73 *Grosoli* [1973] ECR 1555; judgment of 23 January 1980 in Case 35/79 *Grosoli* [1980] ECR 177; judgment of 13 March 1980 in Case 124/79 *Walsum* [1980] ECR 813; judgment of 7 October 1985 in Case 199/84 *Migliorini* [1985] ECR 3325).

The first condition is the one which the Commission has also pointed out: once goods have been admitted to free circulation in one of the Member States, they must be allowed to move freely throughout the Community.

The second condition is that each Member State must guarantee to all the relevant traders established on its territory free access to the national shares allocated to that State. Provided that those conditions are met, Member States are free to decide how to administer the shares in a way which ensures an appropriate apportionment from the economic point of view.

In adopting the system which is the subject of the present action, the Council kept within its wide margin of discretion which the Commission with its maximalist approach refuses to acknowledge. The Commission maintains that the apportionment of quotas into national shares is only permissible if it is subject to extra conditions which, however, do not have any foundation in the judgment of the Court in Case 218/82 (*supra*) and are based solely on political considerations which the Council does not endorse.

The Council considers that there are economic and administrative constraints with regard to products which are sensitive for the Community and its Member States, so that the apportionment of quotas by means of a fixed scale is justified in the case of all products. Every Member State should be in a position to know in advance, with sufficient precision, what volume (with the possible exception of re-exports from other Member States) will be introduced into its market.

In its judgment of 8 October 1986 in Case 385/85 (*S.R. Industries* [1986] ECR 2929), the Court recognized a difference between measures adopted within the generalized preference scheme and those adopted within the common import system.

The generalized preference scheme is a unilateral concession made by the Community and represents a considerable sacrifice on the part of the Member States since the competition from excessively cheap products exported from the countries which are beneficiaries of the generalized preference scheme may produce harmful consequences, such as the closure of factories in regions where unemployment is already acute. The Court recognized that aspect of the tariff system in its judgment of 5 March 1986 in Case 59/84 (*Tezi Textil* [1986] ECR 887).

Therefore, whilst accepting Community administration of the scheme in the case of chemical and petrochemical products, the Council considered it necessary, in the exercise of its wide discretionary powers, not to extend that new system to other products for the time being, to apply fixed criteria for the apportionment of shares and to limit the obligation of Member States concerning the Community reserve which, moreover, is not legally indispensable.

The Council is not in a position to confirm or deny the Commission's assertion concerning the technical possibilities of Community administration. However, it doubts the effectiveness of such a system and points out the great practical difficulties involved in administering it.

Whilst admitting that in the future, in particular after the completion of the internal market in 1992, the system envisaged by the Commission may prove to

be appropriate, the Council points out that the present system has advantages for importers in the Member States as well as for exporters in the beneficiary countries who, at the beginning of each year, are guaranteed a preferential amount which may be imported into each Member State.

In 1986, 70% or more of quotas were used on average. Cases where the take-up rate was lower were due not to the fixed apportionment but to other factors such as export difficulties in the developing countries.

There is no breach of Article 113 of the EEC Treaty. Regulation No 3924/86 certainly falls within the scope of that article (see judgment in Case 45/86, *supra*) but, in view of the lack of an overall commercial policy, Community quotas may be divided into national quotas as the Court has accepted in other sectors (see judgments in Case 41/76 and Case 59/84, *supra*).

(b) *Regulation No 3925/86*

As regards the textile products sector, the Commission concedes that the economic and administrative constraints are more complex than in the field of industrial products in general, particularly because of the close links with the arrangement regarding international trade in textiles (MFA). None the less, the Commission considers that the Council infringed Articles 9 and 113 of the EEC Treaty by removing the embryonic form of Community administration proposed by the Commission consisting in a possibility of to some extent transferring the shares of one Member State to another.

The Commission maintains that in principle considerations concerning industrial products in general are also applicable to textile products.

Given the lack of a reserve such as the one envisaged for industrial products, it is not enough to make a single apportionment on the basis of fixed scales, even if those scales bear more relation to economic realities than those drawn up under Regulation No 3924/86.

The Council points out that the Commission's assessment of the sensitivity of the textile sector is closer to that of the Council than in the case of the other industrial sectors. This shows that the Commission is approaching the matter more from a political than from a legal standpoint.

The Council also refers once again to its interpretation of Articles 9 and 113 of the EEC Treaty and the Court's case-law and concludes that, for the time being, the particular sensitivity of the textile sector permits the maintenance of the present system, which is preferable, notwithstanding its imperfections. Abolition of the national quotas would be tantamount to reducing the concessions made or to instituting other restrictive measures.

IV — Replies to the questions asked by the Court

1. The two parties gave several examples of 'national quotas' in various fields other than generalized preferences.

In the Commission's view, there are at present 135 tariff quotas for all types of products. A proportion of them is allocated amongst Member States (with or without Community reserves).

2. The Commission gave provisional figures on the actual utilization of quotas in 1987 since final percentages were not yet available. The figures submitted by the Council may be summarized as follows:

(i) Industrial products (Regulation No 3924/86):

109 quotas; more than 90% of the quota was used in 67 cases and less than 10% in 5 cases;

(ii) Textile products (Regulation No 3925/86):

513 quotas; more than 90% of the quota was used in 137 cases and less than 10% in 158 cases.

Relying on the final figures for 1986 and the provisional figures for 1987, the Commission gave an affirmative reply to the question whether imports provided for under the preferential system have had to take place according to the normal system following exhaustion of the national share by an importing country in places where the overall quota has not been exhausted. The Council considers that since it is the Commission which administers the generalized preferences scheme, it alone can answer that question.

G. C. Rodríguez Iglesias
Judge-Rapporteur